Bribery and corruption—2015 in review

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Corporate Crime analysis: Neil Swift, partner in the business crime team at Peters & Peters, looks at the most significant developments in 2015 in the area of bribery and corruption.

Legal developments and practical impact

What legal developments have had the biggest impact on your practice in 2015?

2015 has, at last, seen the Bribery Act 2010 (BA 2010) used for the purpose for which it was envisaged and much heralded.

The Serious Fraud Office (SFO) secured its first conviction under BA 2010 in the *Sustainable Growth Group* case. Although the case was primarily a fraud on investors, the SFO were able to identify and separately charge conduct by two of the defendants which technically contravened BA 2010. In reality, the conduct was merely part of the wider fraud.

A few months later, in Scotland, the Crown Office and Procurator Fiscal Service announced the first ever UK disposal of failure to prevent bribery offence under BA 2010, s 7. The case was dealt with by way of a Proceeds of Crime Act 2002 (POCA 2002) civil recovery order in the sum of £212,800. The defendant company, Brand-Rex Ltd, avoided criminal prosecution following a self report and internal investigation. In essence, the company, which specialises in cabling solutions, ran an incentive scheme for its independent distributors and installers. However, one of those agents offered the incentive he had earned to an individual who was employed by, and able to influence procurement decisions of, the end customer. As a result, a financial advantage was given to an employee of the ultimate customer for the purpose of benefitting the business of Brand-Rex. Brand-Rex's procedures had failed to prevent its agents from passing on the incentives to influence customers, and so it was unable to avail itself of the adequate procedures defence. The civil recovery order represented the gross profits made pursuant to misuse of the incentive scheme.

Finally, and perhaps most significantly, the SFO very recently resolved its first BA 2010, s 7 case using a deferred prosecution agreement (DPA). Standard Bank participated with Stanbic Bank Tanzania, one of its sister companies, in raising capital on behalf of the Government of Tanzania. As part of the fundraising, Standard Bank and Stanbic charged a total commission of 2.4%. However, only 1.4% was for Standard Bank and Stanbic. The remaining 1% was for a 'local partner', one of whose directors and shareholders was a serving member of the Government of Tanzania, while another director had until very recently been the CEO of Tanzania's financial regulator, the Capital Markets and Securities Authority (CMSA). The inference was drawn that Stanbic's management had intended the fee paid to the local partner to be used to induce the showing of favour to Stanbic and Standard Bank. Stanbic had next to no due diligence on its file, while Standard Bank's procedures did not require it to conduct its own due diligence on the local partner.

The SFO concluded that the case fell within the criteria for a DPA--the company provided a very prompt self report of conduct which may not have come to the SFO's attention otherwise, and it cooperated with the SFO in the conduct of its internal investigation. In addition, the fact that the company was now under different ownership helped to satisfy the public interest in entering a DPA rather than pursuing prosecution.

How have these affected your ongoing cases and working life? How have you dealt with these on a practical level?

The SFO's successful prosecution of the new BA 2010 offences (in the *Sustainable Growth Group* case) was something of a damp squib. Had the conduct taken place prior to the introduction of BA 2010 it could, but probably would not, have been prosecuted. The BA 2010 charges added nothing to the overall criminality.

However, the approval of the DPA in the *Standard Bank* case was the first opportunity for judicial comment on the BA 2010, s 7 offence and in particular the sort of issues which demonstrated the inadequacy of an anti-bribery procedure. In truth, the case was a perfect opportunity for the SFO to use both BA 2010, s 7 and a DPA--the bribe was engineered by a sister bank over whom presumably the bank was able to exercise a degree of influence when conducting its own

investigation, it was a one-off, and the procedural failings which allowed the conduct to go unchecked were readily apparent.

The SFO has for many months been pressing the message that those conducting corporate internal investigations should not 'trample the scene' and should not seek to 'hide behind' claims of privilege over first accounts of witnesses and/or suspects. The decision approving the DPA provided the court with an opportunity to endorse the level of cooperation demonstrated by Standard Bank, which provided a summary of witness first accounts, facilitated the SFO's interviews of employees and provided complete access to documents and information.

The SFO will use this to reinforce its message of what is required of companies by way of cooperation in order to qualify for a DPA. Of course, cooperation is only one factor to be weighed in the balance in deciding whether a DPA is in the public interest, but it is one of the main factors that can be directly influenced by the company's lawyers.

Have all of the expected developments of 2015 come to pass?

Ironically, the absence of an anticipated legal development has been one of the most significant developments for corporate crime practice in 2015. The government's decision not to bypass the common law on corporate criminal liability by extending the BA 2010, s 7 'failure to prevent' model to 'economic wrongdoing' in general, has disappointed many.

The change in policy, announced at the end of September, limits the UK's future criminal enforcement against corporates: they can be prosecuted for existing criminal offences if the 'identification principle' applies, or, alternatively, under BA 2010, s 7: the former poses a significant challenge to prosecutors, as it requires proof that a directing mind and will of the company was guilty of the alleged offence; the latter only applies where bribery offences were committed after 1 July 2011.

Many in prosecution agencies and government had high hopes that DPAs, introduced in 2014, would encourage corporate self-reporting of criminal conduct. However, this is likely to be far less effective than hoped for. For future corporate misconduct falling outside BA 2010, corporate clients will have little incentive to enter into DPAs absent a realistic threat of discovery and enforcement. The shelving of reform will have a deleterious effect on effective enforcement for many years to come.

Clients and business developments

How has your business developed in 2015? Has this been a good year for work in your area?

This has been a good year for our practice. Our client base and range of instructions has continued to expand. We continue to act for a number of individuals caught up in corruption investigations. This year this has included the successful defence of a client tried for conspiracy to corrupt. She was one of four employees of Swift Technical Services, a company providing contract staff to the oil industry, prosecuted by the SFO for allegedly agreeing to make payments to Nigerian tax officials in order to minimise or delay tax audits to be conducted by the Nigerian federal tax authorities.

We have been retained by corporates both nationally and internationally to advise on a complex array of corruption problems, most significantly on behalf of one of the largest companies in Central and Eastern Europe in which we have had to coordinate litigation and arbitration in several jurisdictions.

We have also been engaged by a number of international businesses to review and update their anti-bribery procedures. This advisory, non-contentious practice is a growing area at our firm, and one we are well placed to do, making good use of our contentious experience.

How has the profile of your clients developed? Can you identify any trends in your clients or types of cases?

We have always acted for a variety of clients: ranging from professionals, company executives, entrepreneurs and high net worth individuals, through small businesses to international corporations. The increase in corruption enforcement globally means that clients look to experienced advisers, whatever the precise nature of their concerns.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor

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